

Toward a More Rational Analysis of the State Action Exemption in Antitrust Law

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process guarantees may be desirable, particularly in the area of disciplinary expulsions from private universities. The "contract" approach which has heretofore constituted the major obstacle seems today an anachronistic characterization of the relationship between university and student, and the "state action" argument is open to question in view of the complicated financing of most private universities.

However, in general decisions dealing with the due process rights of university students exemplify an enlightened judicial attitude toward the function of the law in our complicated society. Due process by its very nature precludes any mechanical application of a pre-determined formula to every conceivable situation. In disciplinary matters, the issues involved lend themselves more readily to the elaborate trappings of strict due process. But a decent respect for society's interest in educational excellence dictates greater deference to the wisdom of trained professionals in the strictly academic sphere, including the area of academic dismissals. Because of the primacy of national educational goals, a continuing judicial awareness of the dichotomy between academic and disciplinary matters will be necessary if the courts are to meet adequately the challenge of vindicating constitutional rights while respecting academic freedom.

M. Michele Fournet

TOWARD A MORE RATIONAL ANALYSIS OF THE STATE ACTION EXEMPTION IN ANTITRUST LAW

The Michigan Public Service Commission, a state agency charged with the regulation of public utilities, approved a tariff requiring Detroit Edison, a public utility and sole distributor of electricity in southeast Michigan, to administer a program of providing electric light bulbs to its customers. Since the tariff included the cost of providing the light bulbs as an element of its regular service, Detroit Edison billed its customers only for the electricity consumed and did not separately charge for the light bulbs. Petitioner, a merchant engaged in retail sale of light bulbs, sued Detroit Edison asserting that the program allowed the utility to use its protected monopoly position to restrain competition in the sale of light bulbs and thus to violate the Sherman Act.¹ The Court of Appeals, citing *Parker v. Brown*,² found that Commission approval amounted to state

1. 15 U.S.C. §§ 1 (1975); 2, 3 (1974); 4-7 (1970).

2. 317 U.S. 341 (1943).

action which immunized the program from federal antitrust law. A divided United States Supreme Court reversed and *held* that a utility could incur liability under the Sherman Act for anticompetitive conduct required by state law when the state's policy is neutral regarding the conduct and the conduct was initiated by the utility itself. *Cantor v. Detroit Edison Co.*, 96 S. Ct. 3110 (1976).

In the landmark decision of *Parker v. Brown* more than thirty years prior to *Cantor*, the Supreme Court held that Congress did not intend the Sherman Act to apply to action undertaken by a state "as an act of government."³ At least one of the justifications for the "state action exemption" is deference to competing interests in the federal system:

In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.⁴

Since the defendant in *Parker* was a state official, and the conduct in question was a state program, the court's inquiry into the scope of the term "state action" was superficial. The decision held only that a program that "derived its authority and efficacy from the legislative command of the state" was not the type of "business combination" prohibited by the Sherman Act.⁵ Nowhere in the opinion did the Court intimate that a different result would follow should the state's participation be less active than in the case under scrutiny. Clearly, *Parker* was not an attempt to articulate a comprehensive scheme outlining the parameters of a "state action exemption."⁶

3. *Id.* at 352, *citing* *Olsen v. Smith*, 195 U.S. 332 (1905). The term "state action," when used in the context of the Sherman Act, should not be confused with the same term used in the context of the fourteenth amendment of the United States Constitution. *See Cantor v. Detroit Edison Co.*, 96 S. Ct. 3110, 3117 (1976). As subsequent discussion will indicate, the scope of the term is narrower in the antitrust context than in the civil rights cases.

4. 317 U.S. at 351 (1943).

5. *Id.* at 350-51. There was some question whether the program was inconsistent with federal law at all. The Court stated at one point that Congress contemplated such state programs when it passed the Agricultural Marketing Agreement Act of 1937. *Id.* at 357.

6. In fact, the entire discussion of the applicability of the Sherman Act appears to have been an afterthought prompted by the intervening decision of *Georgia v. Evans*, 316 US. 159 (1942). The question was not even raised until reargument in the United States Supreme Court. The Court dispensed with the entire issue in only three pages of the twenty-one page opinion. Because of the

The only distinct trend in judicial interpretation of the *Parker* exemption has been to limit its scope, with no general agreement on the basis of such limitations. The decision itself contained two limitations on state antitrust immunity: (1) a state does not immunize private conduct which violates the act by the mere assertion that such activity is lawful,⁷ and (2) a state which becomes part of a private agreement to restrain trade violates the act.⁸

The courts and commentators seem to agree that for conduct to enjoy immunity it must be an act: (1) by a state in its capacity as sovereign;⁹ and (2) in furtherance of a legitimate local interest.¹⁰ Once judicial inquiry ventures beyond these amorphous areas of consensus, there is a total lack of agreement on how to reconcile the interests of federalism enunciated in *Parker* with the interests of competition embodied in the Sherman Act.

The courts have limited the *Parker* exemption by inquiring into the form and content of the State regulation with a rigor ostensibly unjustified by the broad language of *Parker*.¹¹ One line of cases indicates that immunity will be conferred on private action only if the activity is adequately supervised by independent state officials.¹² Another group of

brevity of the discussion and the use of such broad, unqualified language as "state action," the rationale of the exemption has prompted several interpretations. See generally, Handler, *Twenty-Fourth Annual Antitrust Review, Parker v. Brown Revisited*, 72 COLUM. L. REV. 1, 4-19 (1972); Posner, *The Proper Relationship Between State Regulation and Federal Antitrust Laws*, 49 N.Y.U.L. REV. 693 (1974); Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 NW. L. REV. 71 (1974).

7. 317 U.S. at 351.

8. *Id.* at 351-52.

9. Thus excluding acts by a state in a private or proprietary capacity. See *Union Pac. R.R. v. United States*, 313 U.S. 450 (1941), discussed in Slater, *supra* note 6, at 89.

10. Excluding such state action as in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). In *Schwegmann*, Louisiana sought to compel activity which federal law prohibited under the Miller-Tydings Amendment, 15 U.S.C. § 1 (1975). The Court held that a state does not pursue a legitimate local concern when "[i]t demands conduct which the Sherman Act forbids." *Id.* at 389.

11. One commentator noted, "[A]ctually, 'valid governmental action' states a conclusion rather than a test and suggest inquiry rather than ends it Generally, the underlying issue in determining the applicability of such an exemption is the degree of governmental involvement in, and supervision over, the allegedly wrongful private activity" Comment, *Alabama Power Co. v. Alabama Elec. Cooperative: Rural Electrification and the Antitrust Laws—Irresistible Force Meets Immovable Object*, 55 VA. L. REV. 325, 345-46 (1969).

12. *Norman's on the Waterfront v. Wheatley*, 444 F.2d 1011 (3d Cir. 1971); *Gas Light Co. v. Georgia Power Co.*, 440 F.2d 1135, 1140 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972); *George Whitten, Jr., Inc. v. Paddock Pool Builders*,

cases requires that the regulatory statute clearly articulate an intent to restrain trade in pursuance of a legitimate governmental goal.¹³ Another theory, represented by *Goldfarb v. Virginia State Bar*,¹⁴ emphasizes that the anticompetitive activity will not enjoy immunity unless it is compelled, rather than merely authorized by state law.¹⁵

Rather than offering guidance for future resolution of such cases, *Cantor* neither accepted nor rejected any of the earlier approaches, nor could a majority agree on what elements would be necessary and sufficient to invoke the *Parker* exemption. Four separate opinions in the instant case demonstrate a continuing lack of agreement by the Court on the scope of the *Parker* exemption. The Court's opinion, authored by Justice Stevens, was divided into four segments, only two of which enjoyed majority approval. A majority of five justices emphasized that although the Michigan Public Service Commission is authorized to regulate the distribution of electricity by specific legislative command,¹⁶ no statute or commission directive has ever expressed an intent to regulate the light bulb market.¹⁷ The Court noted that the light bulb program had been initiated long before the state of Michigan began to regulate electric utilities¹⁸ and inferred that the state policy was neutral on the desirability of the program. Nevertheless, state law required Detroit Edison to continue the program until abandonment of the existing tariff by the Commission, a result which it could attempt to provoke by filing such a request.

Inc., 424 F.2d 25 (1st Cir. 1970), *cert. denied*, 400 U.S. 850 (1972); *Allstate Ins. Co. v. Lanier*, 361 F. 2d 870 (4th Cir.), *cert. denied*, 385 U.S. 930 (1966); *Asheville Tobacco Bd. of Trade, Inc. v. FTC*, 263 F.2d 502, 508-09 (4th Cir. 1959). *See Slater, supra* note 6, at 91-109; Note, *The State Action Exemption and Anti-trust Enforcement Under the Federal Trade Commission Act*, 89 HARV. L. REV. 715, 723 (1976). *But see* *Washington Gas Light Co. v. Virginia Elec. and Power Co.*, 438 F.2d 248, 252 (4th Cir. 1971) (mere silence by the appropriate regulatory agency could confer *Parker* immunity).

13. *Woods Exploration Prod. Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *Traveler's Ins. Co. v. Blue Cross*, 298 F. Supp. 1109 (W.D. Pa. 1969); Slater, *supra* note 6, at 95.

14. 421 U.S. 773 (1975). *See also* *United States v. Pacific S.W. Airlines*, 358 F. Supp. 1224, 1227 (C.D. Cal. 1973); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 229, 233 (1976).

15. "It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather anticompetitive activity must be compelled by direction of the state acting as sovereign." 421 U.S. at 791. The Court considered compulsion as a "threshold inquiry" but did not intimate what additional elements might be necessary to invoke immunity. *Id.*

16. MICH. STAT. ANN. § 22.13(6) (1970).

17. 96 S. Ct. at 3113-14 (1976).

18. *Id.* at 3113. The program was initiated by the utility and/or its predecessors in 1886. Michigan began regulating utilities in 1909. *Id.*

The Court's analysis of the possible exemption of private conduct required by state law raises two questions: (1) Is it fair to impose liability on a citizen for violation of federal law when he is merely obeying the command of his state?, and (2) Did Congress intend to superimpose antitrust laws on an area of the economy already regulated by the state and to impose regulations that might conflict with those of the state? The Court decided that imposition of liability was fair by concluding that the decision to continue the program was primarily that of Detroit Edison, and that while the initiation of the program was a mixture of public and private decision-making, the state role was not dominant.¹⁹ The Court answered the second question in the affirmative for three reasons. First, state regulations and federal antitrust regulations will not necessarily be inconsistent.²⁰ Second and more important was the conclusion that "even assuming inconsistency, we cannot accept the view that the federal interest [must] inevitably be subordinated to the State's."²¹ Finally, even if Congress did not intend to impose antitrust laws on areas regulated by the states, this case applies the laws to an unregulated area—the market for light bulbs.

The remainder of Justice Stevens' opinion enjoyed the support of only three other justices. The plurality narrowly interpreted the *Parker* exemption as applying only to states or state officials, and not to those who act as a result of state action.²² In considering the fairness of imposing treble damages on the defendant, the plurality concluded that "when regulation merely takes the form of approval of a tariff proposed by the company, it surely has not increased the company's risk of violating the law."²³ Nor could Detroit Edison claim that it was led to believe that its conduct was exempt from federal law since the court had never stated that mere compulsion by state law conferred antitrust immunity.²⁴

Chief Justice Burger concurred, stressing that since Michigan's policy toward the regulation of the light bulb market was neutral, neither

19. *Id.* at 3119. The Court noted that in another case the state's role in the decision-making process might be so dominant that it would be unfair to impose liability on one who merely obeys state law.

20. *Id.*

21. *Id.*

22. *Id.* at 3117. A majority expressly rejected this interpretation; *id.* at 3123, 3128 n.5, 3129.

23. *Id.* at 3121.

24. This conclusion seems to be justified in view of the *Schwegmann* decision. The Court emphasized language in the *Goldfarb* opinion which states that the issue of compulsion by state law is merely a "threshold inquiry." *Id.* See note 15, *supra*.

federal nor state interest would be advanced by conferral of an exemption. Justice Blackmun advocated a "rule of reason" approach, but concurred in the judgment since the potential harms of state regulation here outweigh the potential benefits.

Justice Stewart, joined by Justices Powell and Rehnquist, dissented, opining that the *Goldfarb* decision had established that the *Parker* exemption extended to state-compelled activity.²⁵ The dissent also cited legislative history in support of the contention that Congressional intent exempted such activity.²⁶

The Court's focus on whether the program was initiated by private citizens seems misplaced. Beyond the problem of determining who actually initiates a program where both the state and private industry participate, it may chill the input of information from the private sector to the public sector because of the risk of exposure to antitrust liability.²⁷ The "initiation" test may even be inconsistent with *Parker* itself, since private farmers played an essential role in the initiation of that program.²⁸

Continued reliance on the tests employed by the lower courts is also unsatisfactory since they are all deficient in some respect. *Cantor* illustrates that adherence to the compulsion test may lead to improper results since a state may inadvertently compel anticompetitive activity without advancing a valid state interest. Moreover, *Parker* and *Schwegmann Bros. v. Calvert Corp.* indicate that a state may not confer immunity by merely ordering its citizens to disobey the Sherman Act.²⁹ To conclude otherwise would directly conflict with the supremacy clause.³⁰

The "adequate supervision" and "clear statutory intent" approaches used by some lower courts are less offensive than the compulsion test, but they do not go far enough. The fact that a state agency actively regulates anticompetitive conduct pursuant to a manifest statutory command offers no guarantee that such conduct is either necessary to achieve a legitimate state goal or that the regulation adequately accommodates federal interests in alleviating the evils of monopoly power. Like the compulsion test, these

25. 96 S. Ct. at 3132-33.

26. Relying on floor debates and the House Report on the proposed act, Justice Stewart concluded that Congress intended to exercise its greatest authority under the Commerce Clause without interfering with the legislative authority of the states. *Id.* at 3137.

27. 317 U.S. at 346 (1943). See *Cantor v. Detroit Edison Co.*, 96 S. Ct. 3110, 3126 (Blackmun, J., concurring); cf. *Eastern R.R. Pres. Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

28. *Parker v. Brown*, 317 U.S. 341, 346-47 (1943).

29. See *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 229, 236 (1976).

30. U.S. CONST. art. VI, § 2.

analyses focus on only one half of the equation. They examine only the form of the state regulation without regard to its content and completely ignore federal interests which may predominate. Such tests irrebuttably presume that any state policy interest, no matter how dubious its validity, should prevail over the federal interest if the formal requirements are met. *Cantor* apparently rejects this assumption in the enigmatic dictum to the effect that when two regulatory interests conflict, the state interest need not prevail.³¹

Explication of the latter proposition, together with an examination of the state's policy interest in the area subject to regulation, may lead to a more thorough analysis of the possible antitrust exemption. Since there is strong federal interest in avoiding the evils of monopoly, immunity from antitrust laws should not be conferred unless the state establishes the need for anticompetitive regulation to effectuate a legitimate state goal—a burden not met in *Cantor*.³² Assuming a legitimate state goal, conflict with the federal interest need not necessarily follow, and proper analysis would attempt to render the goals complementary, not mutually exclusive.³³

Should there be a conflict between federal and state interests,³⁴ it is submitted that a balancing test, similar to that suggested by Justice Blackmun in *Cantor*, is the best device to reconcile the federal interests in competition with the state interest in anticompetitive regulation.³⁵ Whether the program is adequately supervised or advances a legitimate state policy are but two elements which would be considered in weighing the potential harms and benefits of such a program.³⁶ The focus under this analysis is

31. 96 S. Ct. at 3119.

32. *California v. FPC*, 369 U.S. 482, 485 (1962) ("Immunity from antitrust laws is not lightly to be conferred.").

33. *Wood's Exploration Prod. Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1302 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972).

34. The initial inquiry is always whether there is a federal interest in competition in the area that the state seeks to regulate. The second question is whether the interests conflict. In the area of distribution of electricity, there is no federal interest in competition, since electric utilities are natural monopolies and competition could cause inadequate service and higher rates. There is, on the other hand, a legitimate federal interest in competition in marketing light bulbs which conflicts with the state-approved light bulb program.

35. 96 S. Ct. at 3124-28.

36. One possible criticism of this approach would be that the private citizen who obeys anticompetitive state law would be in danger of incurring treble damages if the courts later concluded that the federal interest in the area regulated is paramount. The danger is more apparent than real since the citizen, such as Detroit Edison, could seek declaratory judgment in federal court.

properly placed on whether a valid state interest is advanced in the manner least offensive to federal interests, accommodating each interest rather than eliminating one or the other on the basis of a mechanical test.³⁷

Such a balancing test is not without precedent. *Dean Milk v. City of Madison*³⁸ struck down health regulations which, though serving a legitimate state goal, effectively precluded interstate competition in the milk market and were therefore unduly offensive to the Commerce Clause. The Court emphasized that there were many less offensive alternatives available which would effectuate the same policy goal.³⁹ *Polar Ice Co. v. Andrews*,⁴⁰ another Commerce Clause case, employed a similar balancing test to invalidate a local health measure which restricted competition from out of state. There is no reason why the applicability of the balancing approach should be limited to Commerce Clause cases when the relevant inquiry there, as here, is the extent to which legitimate state regulation must interfere with competition.⁴¹

The decision in *Cantor* would have been the same under this approach, albeit for different reasons. Employing a balancing test, the Court would have concluded, as did Justice Blackmun, that there was a conflict of federal and state interests in the regulation of the light bulb market and that the federal interest in competition is paramount. The decision of the Court and the various lower court approaches to the problem again indicate that a continued reliance on a few broad statements in *Parker* does not provide a sufficient analytical framework to determine the scope of the state action exemption. Hopefully, the Court's inquiry into the state policy to be effectuated, and the statement that federal interest need not be overridden by conflicting state interest foreshadows a move toward the balancing test as a substitute for the vague standard provided in *Parker*.

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37. See Posner, *supra* note 6, at 707; Slater, *supra* note 6, at 104. Accommodating competing interests requires an inquiry beyond a determination of which interest is paramount. If the balance of interests favors the state regulation, accommodation requires the further consideration of whether the state interest is effectuated in a manner least offensive to the federal interest. Thus, a court that employs the balancing test might consider alternative methods by which the state could achieve the same policy goal. See *Dean Milk v. City of Madison*, 340 U.S. 349 (1951), discussed in the text at note 38, *infra*.

38. 340 U.S. 349 (1951).

39. *Id.* at 354-56.

40. 375 U.S. 361 (1964).

41. See Slater, *supra* note 6, at 107-08. The tests used in *Polar Ice* and *Dean Milk* would seem particularly appropriate in an antitrust context since the Sherman Act is an expression of Congressional intent authorized by the Commerce Clause.